Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

PAUL S. WEINBERG, General Partner,
t/a Hill House,

Petitioner,

v.

COMCAST CABLEVISION OF PHILADELPHIA, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, General Partner Paul Weinberg, t/a Hill House, owns a multiple dwelling apartment building in Philadelphia, Pennsylvania. Respondent, Comcast Cablevision of Philadelphia, is a cable television service provider. In this case, the courts of the Commonwealth of Pennsylvania have decided important questions of federal law that have not been, but should be, settled by this Court. The questions presented in this petition are as follows:

1. Whether Pennsylvania's Tenants' Right to Cable Television Act is unconstitutional because, in violation of the Fourteenth Amendment, it deprived Petitioner of due process of law, by delegating judicial power to a private forum and by compelling him to submit the question of just compensation for the taking of his property to binding arbitration under a statutory scheme devoid of expert administrative oversight and without de novo judicial review.

2. Whether Pennsylvania's Tenants' Right to Cable Television Act is unconstitutional because it effected a taking of Petitioner's property without just compensation, by arbitrarily limiting the measure of damages to "loss of value," thereby creating, by legislative fiat, a fixed, nominal payment of $1 as "just compensation" for the occupation of Petitioner's property, in violation of the Fifth and Fourteenth Amendments.

3. Whether Pennsylvania's Tenants' Right to Cable Television Act is unconstitutional because the requirement that Petitioner pay one-half of all expenses and fees for an arbitration proceeding to which he did not consent, in and of itself, constitutes "a taking without just compensation," in violation of the Fifth and Fourteenth Amendments.

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OPINIONS BELOW

1. The Opinion of the Superior Court is reported at *Weinberg v. Comcast Cablevision of Philadelphia, L.P.*, 759 A.2d 395, 2000 Pa. Super. 258 (Pa. Super. 2000) (App. A).

2. The Court of Common Pleas issued an unpublished opinion in *Weinberg v. Comcast Cablevision of Philadelphia, L.P.*, Philadelphia County Court of Common Pleas, January Term, 1999, No. 364 on May 17, 1999 (App. B).

3. An unpublished arbitration award was issued on December 7, 1998 in *Comcast Cablevision of Philadelphia, L.P. v. Hill House Apartments*, AAA No. 14E 181 00100 98 D/K (App. D).

STATEMENT OF JURISDICTION

On March 15, 2001, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal from the Superior Court's decision. *Weinberg v. Comcast Cablevision of Philadelphia*, L.P., __ A.2d __, 2001 WL 256063 (Pa. 2001) (App. E). This Court's jurisdiction rests on 28 U.S.C. § 1257(a). Since 28 U.S.C. § 2403(b) may apply, notification as required by Rule 29(c) has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty or property without due process of law . . .

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

68 P.S. § 250.506-B provides, in relevant part:

> (a) A landlord shall be entitled to just compensation from the operator resulting from loss in value of property resulting from the permanent installation of CATV system facilities on the premises.
>
> (b) If a landlord believes that the loss in value of the property exceeds the compensation contained in the proposal accompanying the original notice . . . the issue of just compensation . . . shall be determined in accordance with the following procedure:
>
> > (1) At any time prior to the end of the forty-five day period from the date when the landlord receives the original notice that the operator intends to construct or install a CATV system facility in multiple dwelling premises, the landlord shall serve upon the operator written notice that the landlord demands a greater amount of compensation . . .
> >
> > (2) If the operator is dissatisfied with the result of the negotiations at the conclusion of the forty-five day negotiation period, then he shall notify the landlord of the terms which the operator believes to be unreasonable and shall accompany this notice with a formal request for arbitration.
> >
> > (3) Arbitration proceedings shall be conducted in accordance with the procedures of the American Arbitration Association or any successor thereto. . . . Requirements of this act relating to time, presumptions and

> compensation for loss of value shall apply in the proceedings. The cost of the proceedings shall be shared equally by the landlord and the operator. The arbitration proceedings, once commenced, shall be concluded and a written decision by the arbitrator shall be rendered within fourteen days of commencement. Judgment upon any award may be entered in any court having jurisdiction.
>
> (4) Within thirty days of the date of the notice of the decision of the arbitrators, either party may appeal the decision of the arbitrators in a court of common pleas, regarding the amount awarded as compensation for loss of value . . . During the pendency of an appeal, the operator may not enter the multiple dwelling premises to provide CATV services . . . The court shall order each party to pay one-half of the arbitration costs.

(c) In determining reasonable compensation, evidence that a landlord has a specific alternative use for the space occupied or to be occupied by CATV system facilities, the loss of which will result in a monetary loss to the owner, or that installation of CATV system facilities upon such multiple dwelling premises will otherwise substantially interfere with the use and occupancy of such premises to an extent which causes a decrease in the resale or rental value thereof shall be considered. In determining the damages to any landlord in an action under this section, compensation shall be measured by the loss in value of the landlord's

> property. An amount representing increase in value of the property occurring by reason of the installation of CATV system facilities shall be deducted from the compensation . . .

STATEMENT OF THE CASE

This case presents a challenge to the constitutionality of the Pennsylvania Tenants' Right to Cable Television Act ("the Act"). In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court held that a statute authorizing a cable television operator to install its cable and switch boxes on the roof and side of an apartment building in order to supply services to tenants constituted a permanent physical occupation and thus a compensable taking that triggers substantive and procedural protections guaranteed by the United States Constitution. In this case, respondent Comcast Philadelphia, a cable operator, invoked the condemnation powers delegated to it by the Pennsylvania Tenants' Right to Cable Television Act, 68 P.S. § 250.504-B, *et seq.*, in order to permanently occupy a portion of Petitioner Paul S. Weinberg's apartment building, Hill House.

The Act provides that a tenant may request service from a cable operator who holds the franchise granted by the municipality where the premises are located. The cable operator may then, without the consent of the property owner, enter and permanently occupy a portion of the premises for the purpose of hooking up the tenants to the operator's service. *Id.* at § 250.503-B. The Act supplies no standards or rules governing the private cable operator's decision to take an owner's property, vests sole discretion on the subject in the cable operator, and provides no mechanism for government review of the cable operator's decision to provide (or not provide) cable service. *Id.*

The Act further provides that if, after notice and an opportunity for negotiation, an owner does not consent to the

cable operator's demands, the cable operator can force the owner into a non-judicial proceeding sponsored by the American Arbitration Association (AAA) to enforce the mandates of the Act. The arbitrator, in turn, is empowered to determine, within the valuation constraints set forth in the Act, what just compensation for the taking of the owner's property shall be. Adding constitutional insult to injury, the Act makes the owner liable for half of the AAA arbitration costs, even if the arbitration is conducted without the owner's consent. *Id.* at § 250.506-B(b)(3).

If either party is dissatisfied with the arbitrator's decision, the Act affords the aggrieved party very narrow rights of appeal, which are limited to "appeal[ing] the decision of the arbitrator in a court of common pleas, regarding the amount awarded as compensation for the *loss of value*" of the property. *Id.* at § 250.506-B(b)(4) (emphasis added). The Act does not permit an owner to argue to the arbitrator or to challenge in court the adequacy of the legislatively-determined "loss of value" measure as compensation for the taking. *Id.* Moreover, the Act precludes any judicial determination of just compensation for the taking which may vary from the legislatively-set, nominal "loss of value" measure.

In 1997, 5 of Hill House's 189 tenants requested that Comcast Cablevision of Willow Grove, Inc. ("Comcast Willow Grove") provide them with cable television services. At the time, Hill House tenants received cable programming services through a satellite-based provider, ACS Enterprises, which paid petitioner a commission of 5% of ACS's revenues. In January 1998, Comcast Cablevision of Philadelphia, Inc. ("Comcast Inc."), sent Hill House a Notice of Intention to Provide Cable Television Service under the Act. Comcast Inc. submitted with the notice a proposed contract pursuant to which, on the payment of $1, Comcast Philadelphia would permanently occupy Hill House to install wires and other facilities throughout the building and in all 189 apartments.

In March 1998, respondent, Comcast Philadelphia ("Comcast"), filed a Demand for Arbitration with the AAA. Petitioner objected, but reluctantly participated in the arbitration proceeding. The AAA conducted a non-record arbitration and entered an award in favor of Comcast awarding Comcast permanent occupancy for $1. It also directed Hill House to pay Comcast $1,115.40 (half of Comcast's expenses to accomplish the taking of Petitioner's property in arbitration).[1] Petitioner therefore suffered a net loss of $1,114.40 for the privilege of surrendering his property to Comcast under Pennsylvania's compulsory arbitration statute.

The Court of Common Pleas of Philadelphia County subsequently confirmed the arbitration award based on its holding that the Act did not effect a Constitutional taking. On appeal, the Superior Court, by order entered August 30, 2000, reversed — as contrary to *Loretto* — the lower court's holding that the Act did not effect a Constitutional "taking." The Superior Court found, on the contrary, that Petitioner suffered a taking which triggers Constitutional due process and just compensation concerns. But the Superior Court nonetheless affirmed the lower court's decision on the basis that the Act provided for due process and just compensation. On March 15, 2001, the Pennsylvania Supreme Court denied Hill House's Petition for Allowance of Appeal. This petition for certiorari follows.

The constitutional issues raised in this petition were argued during all stages of the state court proceedings below. In the Court of Common Pleas, Philadelphia County, the constitutional questions were presented in a Petition to Vacate the arbitrator's award. In its Civil Docketing Statement on appeal to the Superior

1. The arbitrator also imposed ongoing "contractual" obligations on Hill House in the form of a mandatory injunction, requiring Petitioner to assist Comcast in its future marketing and other business activities, indefinitely; *i.e.*, supplying tenants with literature, permitting Comcast to solicit customers in the lobby, and allowing Comcast employees on the premises to audit, maintain and service the system.

Court, and its in brief, Petitioner, again, raised the constitutional issues presented here. In its opinion, the Superior Court of Pennsylvania summarized Petitioner's contentions in support of its argument that the Act infringes on a landowner's constitutional right against deprivation of property without due process and just compensation. *Weinberg, supra*, 759 A.2d at 399. Among other things, the court noted the following defects identified by Petitioner with respect to the constitutionality of the Act: (1) the Act requires the parties to submit to arbitration even though the parties have not agreed to arbitration; (2) the Act is an unconstitutional delegation of judicial power; (3) the Act does not provide for de novo judicial review; (4) the Act provides a statutory measure of damages that is in effect "a decrease in the resale or rental value of the property," thereby limiting just compensation to only symbolic or incidental loss; and (5) the Act unconstitutionally requires the property owner to pay for the costs associated with the arbitration proceedings. *Id.* at 400.

The Superior Court rejected Petitioner's arguments as to the unconstitutionality of the statute and concluded that

> Hill House was afforded adequate opportunity to be heard, through statutory arbitration, regarding its right to just and timely compensation . . . [T]he Act need not provide for de novo review or a jury trial as required by the Eminent Domain Code. Moreover, the Act does not limit compensation to "incidental or symbolic loss."

Id. at 403. As to the allegations that the statute unconstitutionally delegates judicial power and mandates arbitration in violation of due process, the Superior Court concluded that its decision in *Adelphia Cablevision* adequately addressed these issues.[2] *Id.* at 404.

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2. In *Adelphia Cablevision*, the Superior Court upheld the arbitration scheme, reasoning that "[d]ue process is a flexible concept

(Cont'd)

REASONS FOR GRANTING THE WRIT

> The requirement that property shall not be taken for public use without just compensation is . . . founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 236 (1897).

A. This Case Presents Important, but Unsettled Questions of Federal Constitutional Law That Should be Settled By This Court

This case raises important questions of federal law that have not been, but should be, settled by this Court. Petitioner asks this Court to consider the constitutionality of statutory schemes compelling property owners to submit to binding arbitration, at their own expense, the Fifth Amendment question of just

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(Cont'd)
that calls for such procedural protections as the situation demands." *See Adelphia Cablevision v. University City Housing Co.*, 755 A.2d 703, 712 (Pa. Super. 2000). However, none of the cases cited by the Court in *Adelphia Cablevision* involved a statutory mandate to submit the constitutional question of just compensation to private, binding arbitration. *See In Re Adoption of Dale A.*, 683 A.2d 297, 300 (Pa. Super. 1996) (termination of parental rights by an orphan's court with counsel, but not parent, present) (citing *Mathews v. Elridge*, 424 U.S. 319, 334 (1976) (administrative agency hearing over termination of statutorily created interest in social security benefits); *Allstate Ins. Co. v. Fioravanti*, 299 A.2d 585, 586-87 (Pa. 1973) (upholding contractual arbitration award relating to automobile insurance policy). In fact, as we shall demonstrate, *infra*, there is *no* federal authority for the proposition that private arbitration satisfies constitutional due process with respect to a dispute involving a property owner's right to "just compensation" under the Fifth Amendment.

compensation for the taking of their property, without the right to de novo judicial review and under a statutory framework that, for all intents and purposes, limits the arbitrator's discretion to an award of nominal damages.[3]

On numerous occasions this Court has held that the Fifth Amendment does not proscribe the taking of property; it merely proscribes a taking of property without just compensation. *Williamson County Regional Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). To avoid the prohibitions of the Fifth Amendment,

> all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.

Id. at 194-95. Pennsylvania's cable access statute denies property owners both "adequate process" and "just compensation."

Over the past two decades, federal courts, including this Court, have steadily extended the reach and legitimacy of private arbitration as a forum for settling a wide array of disputes implicating contractual and/or statutory rights. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (statutory age discrimination claim subject to binding arbitration pursuant to provision in securities registration form); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (agreement to arbitrate claims under the Securities Act enforceable); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (agreement between customer and broker to

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3. The "just compensation" component of the Takings Clause is applicable to the several States through the Fourteenth Amendment. *Chicago, Burlington & Quincy, supra*, 166 U.S. at 235-41.

arbitrate, enforceable as to RICO claim); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (anti-trust claim subject to binding arbitration per agreement between international business entities). However, all of these cases involved parties who had *voluntarily* entered into contractual agreements to arbitrate; and none tested the constitutionality of the arbitral forum as a state mandated mechanism for vindicating constitutional, as opposed to statutory, rights.

In fact, we can find no federal authority sanctioning the use of compulsory arbitration as a means of resolving disputes implicating rights guaranteed to citizens by the just compensation clause of the Fifth Amendment. On the contrary, several federal courts, including this Court, have called such schemes into question, while others have found them unconstitutional on their face. It therefore remains an unsettled question as to whether, or by what means, a compulsory scheme for binding arbitration can satisfy the "adequate process" requirement announced in *Williamson County*. With this case the Court has the opportunity to address this important, but yet unsettled question of constitutional law.

B. Federal Court Precedents Cast Doubt on The Constitutionality of Pennsylvania's Tenants' Right to Cable Television Act

Federal court cases reviewing the constitutionality of legislatively mandated compulsory arbitration schemes to determine "just compensation" in Fifth Amendment takings cases, though not conclusive, cast grave doubt on the constitutionality of Pennsylvania's cable access statute.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), this Court considered the constitutionality of an Hawaiian takings statute that originally contained a compulsory arbitration provision to settle questions of just compensation in connection with the transfer of private land holdings authorized by the Land Reform Act of 1967. Hawaii's Land Reform Act,

designed to break up highly concentrated land ownership in Hawaii, created a mechanism for condemning residential tracts of land and transferring ownership of the condemned fees simple to the current lessees of the property. *Id.* at 232-33.

As originally enacted, the statute provided that mandatory arbitration be held in advance of any action in eminent domain for the purpose of establishing the amount of compensation that would be paid to lessors for the lessor's leased fee interest in the event of condemnation. Lessor and lessee had to engage in compulsory arbitration if they could not reach a negotiated agreement on a price for the fee simple title with the lessor paying half the costs of the arbitration proceedings. Statutory formulae were provided for fixing what "just compensation" would be. *Id.* at 235. In short, Hawaii's Land Reform statute contained all of the substantive and procedural defects contained in Pennsylvania's Tenants' Right to Cable Television Act.

In May 1979, the United States District Court for the District of Hawaii declared the compulsory arbitration provisions and the Act's compensation formulae unconstitutional on their face, even though, under the Hawaiian statute property owners were ultimately afforded the right to a jury trial on the issue of just compensation. *Midkiff v. Tom*, 471 F. Supp. 871, 883 (1979). The district court also expressed the view that the provision of the statute requiring property owners to pay one-half of all expenses and fees in connection with the arbitration proceeding itself constituted an unconstitutional taking without just compensation. *Id.* at 884. No appeal was taken from these rulings. Instead, the legislature amended the statute to provide for mandatory *negotiations, not compulsory arbitration,* and for compensation formulae that were strictly *advisory*. As a result, the constitutionality of the statute's compulsory arbitration scheme did not reach this Court when the remaining provisions of Hawaii's Land Reform Act were upheld in 1984. *See Midkiff*, 467 U.S. 229, 235 n.3 (1984).

More recently, two federal appellate courts considered constitutional challenges to statutory schemes mandating the use of a non-judicial forum to determine just compensation for the taking of private property; one involved the Telecommunications Act of 1996, the other, a Wisconsin statute giving utility companies access to railroad right-of-ways. Unlike Pennsylvania's compulsory arbitration scheme, both statutes relied on administrative agency expertise to make an *initial* determination of just compensation. Nevertheless, these statutes received mixed reviews with respect to the due process protections of *Williamson County*. As discussed, *infra*, the Telecommunications Act passed constitutional muster because, unlike Pennsylvania's cable access statute, it provided de novo judicial review following an administrative agency hearing. Wisconsin's arbitration scheme survived, but only because the issue before the Seventh Circuit was plaintiff's petition for injunctive relief, rather than the constitutionality of the administrative determination of just compensation.

In *Gulf Power Co. v. Federal Communications Commission*, 187 F.3d 1324 (11th Cir. 1999), a group of utility companies challenged the constitutionality of the Telecommunications Act of 1996 ("the Act"). They alleged that the federal statute failed to provide a constitutionally adequate process for obtaining just compensation in connection with a "takings" provision in the Act giving cable television ("CATV") providers mandatory access to plaintiffs' utility poles. The plaintiffs challenged the statute on grounds similar to those raised here. First, they argued that the Act violated separation of powers principles by delegating to the Federal Communication Commission (FCC), instead of a court, the task of determining the compensation a utility would receive for access to its property. Second, they asserted that the Act's provision limiting the FCC to awarding a "just and reasonable" rate within the range of rates set by Congress prevented a utility from receiving the constitutionally required rate of "just compensation." *Id.* at 1331-32.

The Eleventh Circuit agreed, in part, with the contentions of the utility companies on the separation of powers issue. While acknowledging that it is for the legislative branch to determine what private property is needed for public purposes, the Court agreed that, when a taking has been ordered, the question of just compensation is a judicial, not a legislative one. It is not the province of the public, taking property through the Congress or a state legislature, to say "what compensation shall be paid, *or even what shall be the rule of compensation*." *Id.* at 1332 (emphasis added). The Fifth Amendment requires that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. *Id.* (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893)).

In the end, the Eleventh Circuit upheld the constitutionality of the Act because, unlike Pennsylvania's cable statute, the federal telecommunications statute provided for *meaningful* judicial review and it delegated responsibility to an agency with expertise in the field rather than a private arbitrator. "The fact that our constitutional scheme dictates that the judicial branch is entrusted with the ultimate responsibility for ensuring that just compensation is awarded does not mean the other branches of government must be excluded from the process of determining the proper level of just compensation." *Gulf Power*, 187 F.3d at 1333. The Court cited the practical advantages of having an administrative body with technical expertise assisting the judiciary in arriving at a more reliable determination of the proper level of just compensation. *Id.* So long as an administrative agency's decision concerning the level of compensation owed remains *subject to meaningful judicial review*, an administrative hearing can be a legitimate part of providing an "adequate process" for obtaining just compensation. *Id.*

Under the Telecommunications Act, the FCC's rate order compensating a utility company for the use of its poles was subject to review by a federal appellate court which had the

authority both to determine the proper level of just compensation and to ensure that the utility received just compensation.[4] Had the Act narrowed the scope of judicial review and made the FCC the final arbiter of a utility's compensation, the Eleventh Circuit indicated that it may have reached a different conclusion regarding the statute's constitutionality.[5] *See id.* at 1337.

In *Wisconsin Central Limited v. Public Service Commission of Wisconsin*, 95 F.3d 1359 (7th Cir. 1996), the United States Court of Appeals for the Seventh Circuit denied plaintiff railroad company's request for injunctive relief to stop the installation of utility transmission facilities in and around railroad right-of-ways. The transmission facilities were being installed pursuant to a Wisconsin statute that authorized an *administrative body*, namely, Wisconsin's Public Service Commission (PSC), to establish, in the first instance, by rule making, the level of compensation plaintiffs would receive for the taking of their property. The PSC set the rate of compensation at a one time

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4. Central to the court's decision in *Gulf Power* was the extent to which the appellate court could gather information needed to review an FCC determination of just compensation: (1) The court could rely on evidentiary submissions in the record from the FCC hearing; (2) if the record was insufficient, it could remand the case and direct the FCC to supplement the record; (3) the case could be transferred to a district court for a full hearing; (4) the court could appoint a special master to hold hearings and gather any additional information before deciding the just compensation issue; (5) the court could fashion any other "appropriate modes of procedure" to gather evidence pursuant to its authority under the All Writs Act. The Eleventh Circuit found these provisions for review sufficient to afford a utility a full and fair opportunity to submit for *judicial* consideration all relevant evidence bearing on the question of just compensation. *Id.* at 1334-35.

5. The Court did not consider the challenge to the statute's rate structure ripe for review because the FCC had yet to determine the "reasonable rate of compensation" for access to appellant's utility poles, but the Court noted that in *a regulated industry* the level of compensation set by the government must not be so low as to be confiscatory. *Id.* at 1338.

payment of $500. Under the statute, the railroad could petition the commission for compensation greater than $500 if the railroad incurred extraordinary direct expenses as a result of the construction of the facilities or believed that special circumstances existed, as defined in the rule. *Id.* at 1364.

The railroads challenged the PSC's determination of just compensation, alleging, among other things, that the process violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Id.* at 1367. The railroads sought a declaratory judgment and injunctive relief, relying in part on this Court's decision in *Bragg v. Weaver*, 251 U.S. 57 (1919), which they cited for the proposition that "due process requires that an owner may obtain a full hearing in a court of justice . . . before the compensation is finally determined." *Id.* at 1370.

The Seventh Circuit affirmed the decision of the district court denying the railroad's request for injunctive relief. But the court's decision rested more on the absence of irreparable harm than on its conviction that Wisconsin's administrative procedure for determining just compensation satisfied the due process requirements of *Williamson County*. *Id.* at 1369-70. On the contrary, the court agreed with the railroads, that decisions concerning "just compensation owed one whose property is taken as a result of a legislative act is the province of judicial — not legislative — determination." *Id.* The court went on to express its misgivings about the use of a rule making procedure to determine just compensation in light of the limited nature of judicial review aggrieved parties are afforded following administrative rule-making procedures. Under the Wisconsin statute, the court pointed out, judicial review entailed deference to the administrative agency's findings of fact, and just compensation is essentially a factual inquiry. *Id.* "We do not share the district court's conclusion that judicial review by Wisconsin state courts would suffice under the rule of decision in *Bragg*." *Id.*

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court considered several challenges to the constitutionality of certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) mandating binding arbitration to settle disputes among participants in a federally regulated pesticide registration and licensing program. While this Court ultimately upheld the constitutionality of the statute's alternate dispute resolution regime, what is most significant for our purposes is that, in doing so, the Court distinguished a property owner's "ability to vindicate its constitutional right to just compensation" and the "ability to vindicate its statutory right to obtain compensation" under the terms of the pesticide registration program. *See Monsanto*, 467 U.S. at 1019.

Under the FIFRA, pesticide manufacturers are required to submit research data to the Environmental Protection Agency ("EPA") concerning their product's health, safety, and environmental effects as a precondition for registering and marketing pesticide products in the United States. In order to reduce redundant and costly research on the part of secondary producers of the same or similar pesticides and to streamline pesticide registration procedures, the FIFRA authorized secondary manufacturers to use previously submitted data in support of the registration of their own pesticide products.

The FIFRA also instituted a scheme for sharing the costs of data generation, with a later registrant required to compensate the initial registrant for its fair share of the costs of product safety research. The statute required the affected parties to negotiate the amount of compensation owed, and if negotiations failed, either could invoke final and binding arbitration to settle the dispute. If the original data submitter refused to participate in either the negotiations or arbitration, it would forfeit its claim to compensation. By the terms of

the Act, arbitral decisions were not subject to judicial review, absent "fraud, misrepresentation, or other misconduct." 7 U.S.C. § 136a(c)(1)(D)(ii).

Monsanto Company, a developer and producer of various kinds of chemical products, including pesticides, challenged the constitutionality of the FIFRA's data disclosure provisions and the use of binding arbitration to determine its entitlement to compensation under the Act's data sharing provisions. Monsanto alleged that the challenged provisions: (1) effected a "taking of property without just compensation;" (2) violated the original data submitter's due process rights by compelling binding arbitration; and (3) constituted an unconstitutional delegation of judicial power.[6] *Monsanto*, 467 U.S. at 999.

This Court held that insofar as the pesticide statute authorized the EPA to make public trade secrets submitted between 1972 and 1978, a period during which the registrant entertained a reasonable, investment-backed expectation that its trade secret data would be kept confidential, the Act effected a "taking" for which Monsanto would be entitled to just compensation under the Fifth Amendment. *Id.* at 1011. However, because the Tucker Act remained available as a remedy for any uncompensated taking, this Court concluded that Monsanto's constitutional challenge to the arbitration and compensation scheme was not yet ripe for resolution.[7]

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6. The district court found the binding arbitration scheme unconstitutional on its face; being arbitrary and vague and not allowing for judicial review, except in cases of fraud. *Monsanto*, 467 U.S. at 1000. However, the district court mistakenly concluded that Tucker Act remedies were not available to pursue plaintiff's Fifth Amendment takings claims. *Id.*

7. In *Monsanto*, this Court reasoned that the data originator must first complete arbitration and, in the event of a shortfall, exhaust its Tucker Act remedies against the United States before it can be ascertained whether it has been deprived of just compensation. *Id.* at 1019.

Id. at 1019. Unlike Petitioner in our case, Monsanto did not allege or establish that it had actually been injured by an arbitration proceeding under the statute.[8] *Id.*

In contrast to the due process and just compensation claims presented in *Monsanto*, the constitutional challenge to the FIFRA's compulsory arbitration scheme in *Union Carbide* had a somewhat different focus. Union Carbide alleged that the use of private arbitration violated Article III of the Constitution, an injury that was not a function of whether the designated tribunal awarded a reasonable amount of compensation, but of whether an arbitrator had the authority to adjudicate the dispute at all. *Union Carbide*, 473 U.S. at 580.

In deciding to uphold the constitutionality of the FIFRA's compulsory arbitration scheme against an Article III attack, this Court relied on considerations that distinguish *Union Carbide* from the dispute that gives rise to this petition.[9] First and foremost, like Monsanto, Union Carbide could avail itself of a federal judicial forum under the Tucker Act to seek compensation for any uncompensated "taking" resulting from the data disclosure provisions of the Act. In our case, Petitioner is denied a judicial forum by the statute. Second, the right to compensation from subsequent registrants was not a purely private right, but bore many of the characteristics of a public right which did not demand an Article III judicial forum. *Id.* at 589. Third, under Article I of the Constitution, the legislative branch had the power to set up a dispute resolution mechanism to settle a question of entitlement *created by statute*. *Id.* Finally, historically, judicial review of agency decision making is required when it results in the use of judicial process

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8. In our case, Petitioner suffered a net loss of $1,114 as "just compensation."

9. In *Union Carbide*, this Court did not have to identify the extent to which due process may require review of determinations by an arbitrator because, in the proceedings below, the parties abandoned their due process claims.

to enforce an obligation upon an *unwilling defendant*. *Id.* at 590. Under the FIFRA, all of the participants in the pesticide program chose to engage in the data registration process and the only potential object of judicial enforcement power was the follow-on registrant who explicitly consents to have his rights determined by arbitration.[10] *Id.* In contrast, under Pennsylvania's compulsory arbitration statute, Petitioner was an unwilling participant in a non-judicial adjudicative process.

This review of the federal precedents demonstrates that there is no authority supporting Pennsylvania's use of compulsory arbitration to determine what just compensation shall be in connection with the taking of Petitioner's property. To the contrary, all of the cited cases cast doubt on the constitutionality of the Pennsylvania statute.

C. Pennsylvania's CATV Act Does Not Stand Up To Constitutional Scrutiny

In *Loretto v. Teleprompter Manhattan CATV Corp.*, this Court held that a state may not require a building owner to grant access to a cable operator to permanently occupy the premises without just compensation. 458 U.S. at 441. While the Pennsylvania appeals court conceded that the Act effects a constitutional taking in our case, it concluded that the provision under the Act for the payment of damages satisfied any due process and just compensation requirements implicit in *Loretto* even though that amount is *determined by a private arbitrator* pursuant to a statutory provision for payment of *only nominal damages*.

In assessing the constitutionality of the Pennsylvania Act under *Loretto*'s mandate for just compensation, we note that

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10. The voluntary nature of participation in the pesticide program is akin to the voluntary nature of a private contract to arbitrate, making this Court's decision in *Union Carbide* an extension of the *Gilmer* line of cases, while distinguishing it from the case of Petitioner, who has been compelled to submit to an arbitral forum.

the New York statute found by this Court to work an unconstitutional taking in *Loretto* also purported to provide compensation on terms much like that of the Pennsylvania statute. The New York Statute, § 828 of the Executive Law, provided that a landlord may not "demand payment from any CATV company 'in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.' " *Loretto*, 458 U.S. at 423. Pursuant to § 828(1)(b), the State Commission ruled that a one-time $1 payment was the normal fee to which a landlord was entitled "in the absence of a special showing of greater damages attributable to the taking." *Id.* at 424. Prior to the statute, the cable company customarily paid the landlords a fee of 5% of gross revenues. *Id.* at 423.

It is striking that the nominal $1 payment, which was unconstitutional in *Loretto*, is identical to the nominal payment assessed by the arbitrator in the present case, some seventeen years later. In both instances, moreover, the unconstitutional nominal fee was arrived at *despite empirical evidence that the owner was deprived of substantially more valuable revenue due to the taking*. The 5% fee that the cable company would have customarily paid but for New York's taking statute is identical to the fee that ACS Enterprises pays to Hill House. In our case, the statute itself directs the arbitrator to deduce an artificially low value of what was taken. The statute states "[a] landlord shall be entitled to just compensation from the operator resulting from *loss in value* of property resulting from the permanent installation of CATV . . ." 68 P.S. § 250.506-B(a) (emphasis added). The statutory measure of these damages is "a decrease in the resale or rental value of the property resulting from the installation." In *Loretto*, the Commission similarly based its nominal fee on an assessment of what the landlord would receive if the property were condemned. As the amount of property physically occupied is slight, the value of the taking, disregarding revenue, is deemed always nominal.

We recognize that in concluding *Loretto*'s artificially limited compensation regime worked an unconstitutional taking, this Court did not "presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken." *Id.* at 441. While *Loretto* expressed no opinion as to the proper amount of compensation due, it plainly stated that the question was one for the "state courts" to consider. *Id.* The two related implications are that: (1) a procedural regime for compensating takings that lacks provision for a *judicial determination of just compensation* fails to provide an adequate process to value loss from a taking; and (2) the *a priori* calculation of loss as nominal was an inadequate measure of damages.

1. Pennsylvania's CATV Act Deprives Property Owners of Due Process by Delegating Judicial Power to a Private Forum Without Expert Administrative Oversight or Meaningful Judicial Review

In the aftermath of *Loretto*, other states have enacted cable access laws that have purported to satisfy the just compensation requirements of *Loretto*. The Pennsylvania Act pushes the constitutional envelope farther than any other, presenting by far the boldest challenge to a building owner's property rights and the requirements of due process. The Act deprives owners subject to physical takings of the due process afforded by eminent domain proceedings. The Act unconstitutionally delegates state judicial power to the AAA, a private organization. This has two consequences. First, it deprives building owners of procedural due process due to the lack of expert administrative oversight of the taking process. Second, the Act restricts judicial review.

Cable access laws in other jurisdictions have been upheld because some courts have held they provided constitutionally adequate alternatives to eminent domain and judicial proceedings in the form of hearings before an *expert*

administrative tribunal with broad authority to regulate taking entities in the public interest. *NYT Cable TV v. Homestead at Mansfield, Inc.*, 518 A.2d 748, 755 (N.J. Super. 1986), *aff'd*, 543 A.2d 10 (N.J. 1988); *AMSAT Cable Ltd. v. Cablevision of Ct., L.P.*, 6 F.3d 867, 874 (2d Cir. 1993); *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 433 (N.Y. 1983) (on remand). But the Pennsylvania Act is utterly unique in delegating the power to condemn to a private forum *without any administrative or regulatory oversight*. States that delegate cable takings to agencies do not just off-load property owners from the civil justice system for convenience and out of contempt for the Constitutional interests at stake. For example, New Jersey's alternative to eminent domain allegedly satisfies due process because of "the specialized nature and regulatory requirements of the cable television industry . . ." The Cable Television Act "recognizes these factors and reflects a legislative intent that the BPU determine all matters necessary to the enforcement of the act." *NYT Cable* at 755. In upholding the New Jersey statute's due process provisions, the court specifically rested its decision on the fact of a comprehensive regulatory regime that severely constrains cable providers to standards of public service and accountability. *Id.* at 755 ("the administrative power under the Cable Television Act is very broad" and "expressly includes the power to 'supervise and regulate' the 'contracts' entered into by every CATV company.")

The constitutionality of Connecticut's alternative to judicial process and eminent domain was similarly premised on the diversion to an administrative tribunal of disputes concerning matters within the jurisdiction of the agency that conducts the tribunals: the Department of Public Control. *AMSAT* at 874 (owners may petition the department for additional compensation). Moreover, the *AMSAT* court makes much of the owner's recourse, under Connecticut's scheme of administrative justice, to judicial review of "all facts presented in the administrative record." Thus, the court stressed, "any

alleged constitutionally under-compensated taking approved by the administrative agency can be challenged on appeal." *Id.* at 875. In dramatic contrast, the Pennsylvania statute only allows appeal of the amount of lost value resulting from the taking which, as discussed below, will always be a nominal value.

The alleged constitutionality of New York's process is premised on the aforementioned factors of administrative oversight absent from the Pennsylvania statute. *Loretto* on remand, 446 N.E.2d at 433 (N.Y. 1983), stresses that the statute satisfies due process by virtue of providing an expert *administrative* alternative to a judicial forum, and by broad judicial review following disputed administrative adjudications. New York law provided for independent judicial determination of *any* constitutional issue raised in an administrative hearing, and provided for review of any regulation or determination (such as a nominal method of valuing just compensation). 2 N.Y. Jur. 2d Admin. Law §§ 314, 317. The *Loretto* statute, New York's Executive Law Art. 28, §§ 811-31, 18 McKinney Exec. Law 811, *et seq.* (1982) (repealed 1995), gave the Cable Commission broad power to regulate cable providers, including the power to ensure that providers did not "unreasonably delay" the provision of service to "any person or area" within the franchise territory. 18 Executive Law § 824 (1982). The Commission is specifically entitled to order service that it deemed "in the public interest." Compare this to the Pennsylvania case where the power of condemnation is delegated to the cable company with no corresponding public duties, and where the AAA adjudicator has no peculiar jurisdiction over cable matters or power to regulate and enforce standards on the cable provider.

In Illinois, the court in *Times Mirror Cable Television v. First Bank of Springfield*, 582 N.E.2d 216 (Ill. App. 1991) found that the cable access statute's diversion of cable cases from eminent domain proceedings satisfied due process because the

owner was entitled to a judicial proceeding and trial by jury to determine just compensation. *Id.* at 219. The holding is simply that the owner is not entitled to stay access during the pendency of his suit, as he would be able to in an eminent domain proceeding. The procedural issue in *Times Mirror* is entitlement to a pre-deprivation hearing, a very modest constraint compared to that under the Pennsylvania law.

The cases that find cable access laws that deprive owners of eminent domain proceedings constitutional turn on the premise that deprivation of a right to judicial procedure is justified by access to administrative agency hearings and by broad, if not *de novo*, rights of judicial appeal. But Pennsylvania's access law provides no such hearing. And while judicial review might conceivably solve the due process problem of consigning owners' claims to non-contractual arbitration, the Act impermissibly limits judicial review of just compensation. The Act limits the right of appeal to the court of common pleas merely to the issue of the determination of lost value. *See* 68 P.S. § 250.506-B(b)(4). That provision fails to comply with the constitutional mandate of due process, unless the streamlined adjudicative process has first been agreed to by the parties or the owner has a right to a judicial determination on appeal. Compulsory arbitration, coupled with limited review, is all that the Act provides owners in terms of due process.

2. Pennsylvania's CATV Act Denies Property Owners Just Compensation by Ascribing Only a Nominal Value to Their Loss

This Court has held that "just compensation" for a physical taking should put the owner in as good a pecuniary position as he would have been but for the taking, and no eminent domain doctrine is to the contrary. *Olson v. United States*, 292 U.S. 246 (1934); *see Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 11 (1984) (though not mandated, interest on takings may be needed to put owner in as good a position pecuniarily). Because "the basic principle" of takings compensation is

indemnity, measures other than diminution in market value of remaining property are often needed for Constitutionally adequate just compensation. *United States v. 564.54 Acres of Land, PA.*, 506 F.2d 796, 799 (3d Cir. 1974); *see also United States v. 564.54 Acres of Land, PA.*, 441 U.S. 506, 512 (1979). Where taken property interests "have no marketplace," a fair measure of the government's obligation to indemnify "may be the present value of capitalized future earnings." *564.54 Acres*, 506 F.2d at 799. Indeed, departure from the indemnity principle is justified only by need for an objective, workable measure of loss. *564.54 Acres*, 441 U.S. at 512. Under *United States v. Fuller*, 409 U.S. 488, 490 (1973) and *564.54 Acres*, 441 U.S. at 512, the legislature may not arbitrarily *rule out* from judicial consideration the only form of compensation appropriate to indemnify the pecuniary in question: fair market value measured as the present value of the revenue stream from the taken property.[11]

While there is no "marketplace" for the space in Hill House's wall cavities and on the exterior of its building that Comcast proposes to occupy, the commercial value of that property is shown by the 5% commission that ACS Enterprises contracts to pay Hill House for exclusive access. When franchised cable is installed in a building, the owner is prevented from exclusively contracting to provide his tenants with comparable satellite-based service such as that of ACS Enterprises. A court, engaged in the judicial determination of just compensation, might find that the true measure of economic loss to apartment building owners is not the reduction of property value but the value of lost revenue stream that the owner was realizing by contracting for provision of private cable. Such contractual earning potential increases present value

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11. For example, in cases involving land containing minerals, value of mineral-bearing land is determined by the "income capitalization method, in which the income stream from the sale of minerals over a number of years is capitalized in terms of present worth." *United States v. 47.14 Acres of Land*, 674 F.2d 722, 726 (8th Cir. 1982).

of the property. *Such increase in present value is the subject of the taking*. At the very least, the owner must have some ability to *argue to a court* that just compensation for taking his or her right to grant exclusive use of the property is the pecuniary value of revenue lost thereby.

But, under the Act, the owner is denied any ability even to argue for that measure of just compensation to a court. The Act provides only that, "A landlord shall be entitled to just compensation from the operator resulting from *loss in value* of property resulting from the permanent installation of CATV system facilities on the premises." 68 P.S. § 250.506-B(a). The statutory measure of these damages is "a decrease in the resale or rental value of the property resulting from the installation." Thus, loss of revenue is arbitrarily defined as non-compensable. Moreover, this is a strictly a legislative determination. While the statute provides for appeal to a court of common pleas, such appeal is limited to "to amount awarded for loss of value or for physical damages to the property." *Id.* at § 250.506-B(b)(4). The Act does not provide for any judicial challenge to the legislatively-determined "loss of value" measure of damages.

In *Loretto*, this Court declined to rule on the Constitutional adequacy of the valuation of the loss before the state court did so on remand. *Loretto*, 458 U.S. at 441. The court's comment that it did not presuppose that just compensation would be the same 5 percent royalty on the cable company's receivables does not imply that a legislative determination that merely nominal valuation is available would suffice. But that is the conclusion that some courts have drawn. Some post-*Loretto* cable access cases, including *Loretto* on remand to the New York courts, uphold statutes that effectively ascribe a nominal value to owners' Constitutionally protected property interests (but, as noted above, these cases all provide additional procedural due

process that may redeem the statutes).[12] *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983); *NYT Cable TV v. Homestead at Mansfield, Inc.*, 518 A.2d 748, 752-53 (N.J. Super. 1986), *aff'd*, 543 A.2d 10 (N.J. 1988); *Cablevision of the Midwest, Inc. v. Gross*, 639 N.E.2d 1154 (Ohio 1994); *Princeton Cablevision, Inc. v. Union Valley Corp.*, 478 A.2d 1234 (N.J. Super. Ch. 1983). The statutes are upheld as providing *an individualized determination* of compensation, as opposed to a *fixed* provision for nominal compensation. *Loretto*, 446 N.E.2d at 433 (provision for nominal compensation "by regulation" was the only constitutional problem). *AMSAT Cable Ltd. v. Cablevision of Ct., L.P.*, 6 F.3d 867, 875 (2d Cir. 1993) holds that the Connecticut mandatory cable access statute provides just compensation *because* it "does not appear to prescribe a binding rule with respect to the ascertainment of just compensation." *See also* Michigan Court of Appeals in *City of Lansing v. Edward Rose Realty, Inc.*, 502 N.W.2d 638 (Mich. 1993) (condemnation proceedings to gain access to easements for a cable company was unconstitutional where landlord already provided comparable programming.)

The Pennsylvania statute is constitutionally flawed because it prescribes a "binding rule" that owners may receive only nominal compensation, with no possibility of overcoming that presumption. An award of nominal damages is never constitutionally adequate compensation for the taking of demonstrably valuable property interests such as that here.

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12. Neither the *Loretto* plaintiff nor any member of the certified class ever made application to the Cable Commission for just compensation. *Loretto v. Group W. Cable*, 522 N.Y.S.2d 543, 545 (1st Dept. 1987). The plaintiff did, however, seek attorney fees as a prevailing Section 1983 litigant. The court held that the fee claim was unripe because the plaintiff would have to apply for compensation and be disappointed in order to prove deprivation, and this Court denied certiorari on this unrelated issue. *Loretto v. Group W. Cable*, 488 U.S. 827 (1988).

3. Pennsylvania's CATV Act Effects a Second Uncompensated Taking by Requiring Property Owners to Pay for Private Arbitration

Not only does the Act arbitrarily rule out appropriate forms of just compensation, it penalizes the owner by forcing him to pay for half the costs of the proceedings by which his property is taken involuntarily. *See* 68 P.S. § 250.506-B(b)(4),(5). By cynical design, the Act nullifies the owner's right — inadequate in the first instance — to a determination of just compensation. It does so by *always* imposing a *de facto* penalty on the disputing owner that vastly exceeds the nominal compensation he may recover. The effect is to coerce acquiescence by penalizing the assertion of what Pennsylvania admits are constitutional rights.

Petitioner has noted above that decisions in several states uphold statutes that artificially ascribe nominal value to owners' *Loretto* rights. However, there is no precedent at all for imposing a financial penalty — a second taking — on property owners who have the temerity to demand an individualized accounting of compensation. On this, the Pennsylvania requirement that owners pay half of the cable company's costs of taking the owners' property is uniquely infirm. Pennsylvania's statute not only artificially imposes a nominal value on an owner's constitutionally protected interests, it also makes him or her pay a substantial penalty for exercising an admittedly quixotic right to just compensation.

CONCLUSION

In light of the foregoing, Petitioner respectfully requests that this Court grant its Petition for Certiorari.

Respectfully submitted,

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